PBJ Construction Sdn Bhd v Anwar Yeo Abdullah & Anor

HIGH COURT (TAWAU) — CIVIL SUIT NO TWU-22NCvC-11/4 OF 2020
LIM HOCK LENG JC
10 MARCH 2021

Companies and Corporations — Director — Fraud on creditors — First defendant resigning and transferring the housing project to second defendant amounted after High Court judgment — Whether there was intention to defraud and the corporate veil ought to be lifted — Whether act of directors in resigning and transferring land amounted to attempt to defraud creditor

The plaintiff sued Metro Utama Jadi Sdn Bhd ('the said company') for the balance of monies outstanding arising out of site clearing and earthworks carried out on a piece of land ('the land'). The works were for a contemplated housing project. The parties had signed off a letter of award and quotation dated 26 November 2011. Part payment of the money due was paid by the company and a larger part was settled by a company known as Lima Ribu Juatamas Holding Sdn Bhd while the rest remained unpaid. Thus, the plaintiff sued the said company. The plaintiff had obtained judgment against the said company on 21 July 2017 which was upheld by the Court of Appeal and ordered the company to pay RM10,000 costs on 26 September 2018 for the appeal. The company did not settle the judgment sum and costs awarded by the Court of Appeal. Soon after the High Court judgment, the first defendant together with his only other co-director resigned from the said company's board and were replaced by two new directors where the first defendant transferred his 495,000 shares and 5,000 shares to these new directors. Further, the first defendant who was the owner of the land caused to be transferred the housing project to the second defendant company on or about 1 August 2018. The plaintiff's claim was that the defendants caused the housing project to be fraudulently transferred from the said company to the second defendant, and the fraud was carried out or facilitated by the first defendant who was the alter ego of the transferor and transferee companies and that there was intent to defraud it as a creditor. The issue to be determined was whether there was intention to defraud, and the corporate veil ought to be lifted.

Held, allowing the claim and reliefs sought except for exemplary damages and statutory interest with costs of RM40,000:

(1) The application was dismissed as the cause of action was distinct from that in the suit initiated by the plaintiff against the said company for monies due and outstanding. Here the action was against the first and

second defendants who were not parties in the other suit, and the action was to enable the recovery of monies by recourse to the lifting of the veil on account of the defendants' fraudulent conduct pursuant to statutory provision and under common law (see para 18).

(2) The plea of limitation was of no help to the defendants since the housing project was transferred to the second defendant on or around 1 August 2018. The impugned act fell within the three year limitation period as the plaintiff sued on 16 April 2020 (see para 19).

(3) There was hardly any room for doubt that the transfer was dishonestly intended to deprive the plaintiff of its fruits of litigation as, among other factors, the transfer of the future earnings from the project took place barely two weeks after the High Court entered judgment against the said company. The objective and incriminating documents showed that the first defendant was the alter ego of all three companies involved. The first defendant was not only the controlling or majority shareholder in these companies, but he was also the registered proprietor of the land upon which the project was to be developed. The dishonest or fraudulent intention was apparent from the impugned transaction taking place so shortly after the High Court had entered judgment against the said company (see paras 30–32, 44).

[Bahasa Malaysia summary

Plaintif mendakwa Metro Utama Jadi Sdn Bhd ('syarikat tersebut') untuk baki wang belum dibayar daripada pembersihan tapak dan kerja tanah yang dijalankan pada satu bidang tanah ('tanah tersebut'). Kerja-kerja yang dijalankan adalah untuk satu projek perumahan yang dirancang. Pihak-pihak telah menandatangani satu surat penganuggerahan dan sebut harga bertarikh 26 November 2011. Sebahagian pembayaran wang yang terhutang telah dibuat oleh syarikat tersebut dan satu bahagian yang lebih besar telah diselesaikan oleh satu syarikat yang dikenali sebagai Lima Ribu Jutamas Holding Sdn Bhd manakala selebihnya masih belum berbayar. Oleh yang demikian, plaintif telah mendakwa syarikat tersebut. Plaintif telah memperoleh penghakiman terhadap syarikat tersebut pada 21 Julai 2017 yang telah dikekalkan oleh Mahkamah Rayuan dan memerintahkan syarikat tersebut membayar RM10,000 kos pada 26 November 2018 untuk rayuan tersebut. Syarikat tersebut tidak menyelesaikan jumlah penghakiman dan kos yang diawadkan oleh Mahkamah Rayuan. Tidak lama selepas penghakiman Mahkamah Tinggi, defendan pertama dengan satu-satunya pengarahnya telah meletak jawatan daripada lembaga syarikat tersebut dan digantikan dengan dua orang pengarah baru yang mana defendan pertama telah memindahkan 495,000 sahamnya dan 5,000 saham kepada pengarah baru ini. Lanjutan itu, defendan pertama yang merupakan pemilik tanah tersebut telah menyebabkan projek perumahan tersebut dipindahkan kepada syarikat defendan kedua pada atau sekitar 1 Ogos 2018. Tuntutan plaintif adalah bahawa defendan telah

menyebabkan projek perumahan tersebut telah dipindahkan secara frod daripada syarikat tersebut kepada defendan kedua, dan frod tersebut telah dilakukan atau dibantu oleh defendan pertama yang merupakan *alter ego* syarikat pemindah dan penerima pindahan dan bahawa wujud niat untuk menipunya sebagai pemiutang. Isu untuk diputuskan adalah sama ada wujud niat untuk menipu, dan sama ada tirai korporat patut diangkat.

Diputuskan, membenarkan tuntutan dan relif yang dipohon kecuali ganti rugi teladan dan faedah statutori dengan kos RM40,000:

(1) Permohonan ini telah ditolak kerana kausa tindakan adalah berbeza dengan guaman yang dimulakan oleh plaintif terhadap syarikat tersebut untuk wang terhutang. Di sini tindakan adalah terhadap defendan pertama dan kedua yang bukan merupakan pihak dalam guaman tersebut, dan tindakan adalah untuk membenarkan pemulihan wang melalui mengangkat tirai korporat atas sebab tindakan fradulen defendan selaras dengan peruntukan statutori dan di bawah *common law* (lihat perenggan 18)

(2) Rayuan berkaitan dengan had masa tidak membantu defendan kerana projek perumahan tersebut telah dipindahkan kepada defendan kedua pada atau sekitar 1 Ogos 2018. Pelakuan tersebut jatuh di dalam tempoh had masa tiga tahun kerana plaintif telah menyaman pada 16 April 2020 (lihat perenggan 19)

(3) Tiada apa-apa ruang untuk keraguan bahawa pemindahan tersebut telah dilakukan dengan niat curang bertujuan untuk menghalang plaintif daripada menerima hasil litigasinya, antara faktor yang lain, pemindahan pendapatan akan datangn daripada projek tersebut berlaku tidak sampai dua minggu selepas tarikh Mahkamah Tinggi memasukkan penghakiman terhadap syarikat tersebut. Matlamat dan dokumen yang menunjukan defendan bersalah menunjukan bahawa defendan pertama merupakan *alter ego* ketiga-tiga syarikat yang terlibat. Defendan pertama bukan sahaja pemegang saham majoriti atau mengawal dalam syarikat tersebut, tetapi dia juga merupakan pemilik berdaftar tanah tersebut yang mana projek tersebut sepatutnya dibangunkan. Niat curang adalah jelas dariapda transaksi yang berlaku sejurus selepas Mahkamah Tinggi telah mengeluarkan penghakiman terhadap syarikat tersebut (lihat perenggan 30–32, 44)]

Cases referred to

Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors [2018] 2 MLJ 693, FC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)

Rookes v Bernard [1946] AC 1129 (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261 (folld)

Legislation referred to

Companies Act 2016 ss 466, 540(1)
Evidence Act 1950 s 58

Liew Mei Yee (WV & Partners) for the plaintiff.
Andy Tay (Andy Tay & Assoc) for the first and second defendants.

Lim Hock Leng JC:

[1] The plaintiff is a local company of limited liability.

[2] The plaintiff sued Metro Utama Jadi Sdn Bhd ('the said company') for the balance of monies outstanding, arising out of site clearing and earthworks it had carried out on a parcel of land in Tawau held under CL 105241003 ('the land'). These preparatory works were for a contemplated housing development known as D'Bayan Fruit Garden ('the housing project'). For these preparatory works, the parties had signed off on a letter of award and quotation, both of which were dated 26 November 2011.

[3] Part payment of the money due was paid by the said company (RM150,000) and a larger part (RM372,896.20) was settled by a company known as Lima Ribu Juatamas Holding Sdn Bhd. The rest was unpaid. The plaintiff thus sued the said company on or around 29 January 2016.

[4] On 21 July 2017, it obtained judgment against the said company for:

(a) the principal sum of RM920,718.30 as at 7 May 2013;

(b) late payment interest of RM930,448.06 at at 31 December 2015;

(c) interest at the rate of 2% per month on the sum of RM920,718.30 from 1 January 2016 until full payment;

(d) costs of RM30,000; and

(e) the defendant's counterclaim was dismissed.

[5] On 26 September 2018, the decision of the High Court was upheld, and the appeal by the said company was dismissed. The Court of Appeal also ordered the said company to pay costs of RM10,000 for the appeal.

[6] The said company did not settle the judgment sum and costs awarded by the Court of Appeal.

[7] The plaintiff's solicitors made a written demand dated 13 November 2019 on the said company, but to no avail.

[8] They then followed up with a statutory notice dated 10 January 2020 pursuant to s 466 of the Companies Act 2016.

[9] Still, the said company did not pay up.

AFTER THE HIGH COURT JUDGMENT

[10] Soon after the High Court judgment, the first defendant, Anwar Yeo Abdullah, together with his only other co-director Yong Lee Fong, resigned from the said company's board. They were replaced by one Matarol bin Sarabi and one Romansah bin Nuhani on or around 5 September 2017. At the same time, the first defendant transferred his 495,000 shares (comprising 95% of the paid-up capital and issued shares) and the other shareholder transferred her 5,000 shares to these new directors.

[11] The first defendant ('DW1') admitted there was no consideration for the transfer of these shares (see NOP, Q&A pp 162–163 and 175).

[12] Also after the High Court judgment, the first defendant who is the owner of the land caused to be transferred the housing project to the second defendant company on or about 1 August 2018.

[13] The first defendant is the majority/controlling shareholder in the second defendant company. Of the issued shares, the first defendant has 495,000 shares while the minority shareholder, Yong Lee Fong, has 5,000 shares. The first defendant and Yong Lee Fong are the only directors of the second defendant.

[14] The housing project is the only income stream for the said company. There is no evidence that it has any other assets to satisfy the judgment debt. Land and vehicle searches have come to nought (see WSPW2, Q&A pp 8 and 14). DW1 acknowledged as much in his cross-examination:

> Q 176 [PUT]: You transfer your share to third party without consideration because Metro Utama Jadi Sdn. Bhd. is and was no longer having any asset and money, agree?
>
> A: Setuju.

[15] According to PW1 (a director of the plaintiff), the plaintiff agreed to carry out the site clearing and earthworks thinking that the said company would have a source of income, as he had been informed by the first defendant that the said company was the developer for the housing project.

THE PLAINTIFF'S CAUSE OF ACTION

[16] The plaintiff's grievance is that the defendants caused the housing project to be fraudulently transferred from the said company to the second defendant, and the fraud was carried out or facilitated by the first defendant who was the alter ego of the transferor and transferee companies. The plaintiff asserts that there was an intent to defraud it as a creditor. It relies on s 540(1) of the Companies Act 2016 which reads:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[17] The plaintiff also contends that, on the facts obtained, the corporate veil ought to be lifted against the first and second defendants at common law.

THE DEFENDANTS' DEFENCES

Res judicata

[18] As an interlocutory measure, the defendants took out an application to strike out the action on the basis that the matter was res judicata. The application was dismissed as the cause of action is distinct from that in the suit initiated by the plaintiff against the said company for monies due and outstanding. Here the action is against the first and second defendants who were not parties in the other suit, and the action is to enable the recovery of monies by recourse to the lifting of the veil on account of the defendants' fraudulent conduct pursuant to a statutory provision and under common law. The parties here could not be parties in the earlier action. It was altogether a different dispute and cause of action.

Limitation

[19] As such, the plea of limitation (vide para 16 of the defence) is also of no help to the defendants since the housing project was transferred to the second defendant on or around 1 August 2018 (as admitted in para 8 of the defence).

That would be the earliest point in time that time would start to run, and we need not even look at the time when the plaintiff subsequently discovered the alleged fraud. The impugned act falls within the three year limitation period as the plaintiff sued on 16 April 2020. On any view, the defendants did not pursue this line of defence in submissions.

Whether there was intention to defraud, and the corporate veil ought to be lifted

[20] In the statement of agreed facts ('SAF'), it was agreed that the first defendant is the registered owner of the land, judgment was entered by the High Court at Tawau against the said company on 21 July 2017 and the said company's appeal was dismissed with costs of RM10,000 by the Court of Appeal on 26 September 2018.

[21] It was also agreed the first defendant was a director of and shareholder in the said company from 2011 to 5 September 2017. The first defendant and one Yong Lee Fong ceased to be directors on 6 September 2017, and were succeeded by Matarol bin Sarabi and Rosmanah bin Nuhani.

[22] It was further agreed that the first defendant had transferred his shares in the said company to these new directors around the same time.

[23] The first defendant's position as a majority/controlling shareholder and director in the said company, second defendant, and Lima Ribu Jutamas Holding Sdn Bhd (which had made payments for the said company to the plaintiff) are objective facts set out in the company searches exhibited in CBOD, Part A. So also the status of Yong Lee Fong as a director and minority shareholder in these three companies. These facts are admitted and thus need not be proved (see Evidence Act 1950, s 58).

[24] The transfer of the project from the said company to the second defendant is not in dispute.

[25] Nonetheless, for completeness, the plaintiff referred to the following strands of evidence as proof of the transfer: (a) the said company's directors' circular resolution dated 1 August 2017 surrendering the project to the first defendant and authorising him to execute and give effect to that objective; (b) an architect's letter dated 3 August 2017 to inform Majlis Perbandaran Tawau that the first defendant had requested for a change in developer from the said company to the second defendant; (c) a letter dated 3 August 2017 issued by a local law firm, Messrs Lawrence Chai, Peter Soong & Partners. It was written on the instructions of the first defendant. It was directed to Majlis Perbandaran Tawau, informing the local authority that the said company had ceased to be the developer and naming the second defendant as the current

developer; and (d) the second developer's letter dated 8 August 2017 to one Tuan Ismail bin Che Hassan of Unit Perumahan Penjawat Awam 1 Malaysia informing him of the change of developer from the said company to the second defendant. These four letters are in CBOD Part B, pp 82–86. They were not disputed by the defendants.

[26] What was in dispute was whether there was an intention on the part of the first and second defendants to defraud the plaintiff as a creditor of the said company, and if the corporate veil ought to be lifted.

[27] The facts which are determinative of the issues fall within a narrow compass.

[28] The defendant contended that the said company is a separate legal entity from its shareholder the first defendant, and the second defendant which has common directors and shareholders. The defendant also contended that the plaintiff is itself to blame for negligently not asking for a guarantee from defendants. It is doubtful if the victim blaming works to exculpate the defendants from liability, if it is shown that the corporate veil ought to be lifted in the face of fraud within the meaning of s 540(1).

[29] Learned counsel for the plaintiff, relying on *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261 and *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693, rightly submitted that the test is whether there was dishonesty involved in the transfer of the project to the second defendant.

[30] There is hardly any room for doubt that the transfer was dishonestly intended to deprive the plaintiff of its fruits of litigation as, among other factors, the transfer of the future earnings from the project took place barely two weeks after the High Court entered judgment against the said company.

[31] The objective and incriminating documents show that the first defendant is the alter ego of all three companies involved.

[32] The first defendant was not only the controlling or majority shareholder in these companies, but he was also the registered proprietor of the land upon which the project was to be developed. The circular resolution (CBOD, Part A, p 82) of the said company 'surrendering' the housing project to 'the land owner' who is the first defendant who then chose to transfer it to the second defendant which he also controlled, provides irrefragable proof that the first defendant is the puppet master of these companies which share common addresses. The flyer for the project in CBOD, Part A, p 45, shows that the address of the second defendant is Bangunan Institut Memandu Cemerlang,

which is the business address of the said company (see CBOD, Part A, p 12). As noted earlier, the first defendant admitted there was no consideration for the transfer.

[33] I find it equally telling all the exhibited cheques of the said company and Lima Ribu Jutamas Holding Sdn Bhd were signed by the first defendant as the sole signatory (see CBOD, Part B, pp 124–127). It is demonstrative of the first defendant's control of the finances, the reason for the existence of these companies. The first defendant alone testified for the second defendant.

[34] At this stage, it would be appropriate to hearken to *Tradewinds Properties*. The following passages by Hasnah JCA (as she then was) were cited for the plaintiff:

> [46] The first defendant was not only a director in the second defendant and held 100% shareholding but also a director in the third defendant with 85% shareholding. He admitted in evidence that he is in total control of the second defendant. The first defendant gave evidence that the third defendant was in fact incorporated to receive the payments of professional fees for work undertaken by the second defendant. Further, the second defendant's expenses were also borne by the third defendant.
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> [47] In the appeal before us, it could be reasonably inferred that the two companies had operated as a single commercial entity. The first defendant is clearly the alter ego of both the two companies. The Federal Court in the case of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 held:
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> > [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality.
> >
> > [97] As to what constitutes fraudulent purposes, it has been described as to include actual fraud or fraud in equity. And fraud in equity occurred in '... cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...'.

[35] I find that the facts of this case warrant the application of the principles enunciated by the Court of Appeal and the Federal Court.

[36] There is no merit to the defence or explanation that the said company 'did not meet the requisite criteria to obtain bridging finance for the proposed residential housing project ... on the said Land and as a result ceased to have any further role in the development on or about 1 August 2017' (see BP, p 12, para

8). In amplification thereof, it was pleaded that the second defendant was incorporated in 2005 and later had a track record in the development of properties; and the second defendant, on or about 9 October 2017 obtained approval from Unit Perumahan Penjawat Awam 1 Malaysia ('PPA1M') in the Prime Minister's Department for a financial subsidy (see BP, p 12, para 9).

[37] To begin with, there was no evidence adduced at trial to show that the said company had applied for a bridging loan from MBSB Bank. What was adduced was merely a blank MBSB financing application form (see CBOD, Part B, pp 70–81). It is altogether quite different from a rejection letter from the bank. There is not even any evidence of an application for bridging finance by the said company.

[38] As for the averment that the second defendant received approval by PPA1M on or about 9 October 2017 for financial subsidies, it is difficult to see how it helps the defendants in resisting the plaintiff's claim. If anything, it supports the plaintiff's case that after the judgment was obtained on 21 July 2017, the defendants put into motion a series of moves with the dishonest objective of evading the said company's obligation to pay the monies due to the plaintiff. To be specific here, the second defendant took away from the said company a subsidy of RM60,000 for each of the 203 units of housing which comes to a total of RM12,180,000 — monies that should have been utilised to pay the plaintiff.

[39] Next, the defendants argued that the reason for the transfer of the project from the said company to the second defendant was because PPA1M had a change of policy and required the developer to have a track record. A perusal of the defence will show that this purported change of policy is unpleaded and thus ought to be disregarded. See *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 and *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, both decisions of the apex court. The defendants only pleaded the second defendant has a track record, not that the developer of the project must have a track record.

[40] Even if the point can be considered as pleaded, as highlighted by learned counsel for the plaintiff, it does not hold water since it was the second defendant who requested the change of developer (see CBOD, Part B, pp 85–86); and there is no evidence to support the contention that PPA1M had a change of heart.

[41] Firing the defendants' last salvo, learned counsel for the defendants valiantly attempted to distinguish *Tradewinds Properties* in reply submissions, encl 66. He argued that unlike the second defendant in the instant case which

was set up in 2005, the third defendant there was clearly incorporated with the intention to defraud the plaintiff in the face of its suit, by the siphoning of cash/consultation fees due to another defendant. He further argued that the said company was dormant and the project could not be guaranteed to be a success. He likened the said company to a parasite needing constant financial assistance from the first defendant.

[42] Tied to these arguments is the quaint or quirky suggestion that the transfer of the project was innocuous as it was carried out before the Court of Appeal hearing (albeit after the High Court judgment). Hence the cross-examination of PW2, preceded by a confirmation of the dates of the High Court judgment and the decision of the Court of Appeal, as follows:

> PUT: Do you agree that the Defendants would not be able to predict the future by fraudulently transfer, resign and substitution as alleged?
>
> A: I agree that nobody can predict the future.
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> (see NOP, Q&A 86)

[43] The suggestion that liability could only attach to the defendants if the transfer of the project had taken place after the Court of Appeal dismissed the said company's appeal is unmeritorious, to say the least. If that argument were to be taken to its logical conclusion, liability could only attach to the defendants if the transfer had occurred after the conclusion of proceedings in the Federal Court. That clearly cannot be the case.

[44] Suffice to say, the dishonest or fraudulent intention is apparent from the impugned transaction taking place so shortly after the High Court had entered judgment against the said company.

[45] The not unsubstantial subsidies and the prospect of future earnings from the project are real. There is otherwise no conceivable reason for the first defendant to transfer the project to the second defendant, with letters to PPA1M, and from the first defendant's lawyers and architect to Majlis Perbandaran Tawau, as well as flyers on the project. Why go to all that trouble if there is no money to be made from the project? The payments by the first defendant for the said company only goes to show he financed the said company, with the expectation of making money from the project.

CONCLUSION

[46] For the reasons given, the plaintiff has succeeded in proving its case and is hereby granted the reliefs sought except for exemplary damages (since the acts complained of do not fall within the limited instances allowed in *Rookes v Bernard* [1946] AC 1129) and statutory interest (since there is already

provision for contractual interest in the amount due). The plaintiff is to be paid costs of RM40,000 subject to payment of the allocatur fee.

Claim and reliefs sought allowed except for exemplary damages and statutory interest with costs of RM40,000.

Reported by Izzat Fauzan